UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/615
3 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 615

Case No. 678: LEO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 29 June 1992, Edmund K. Leo, a staff member of the United Nations filed an application requesting the Tribunal:

"1. As a preliminary measure, to order the Respondent to produce:

...

(b) [Various memoranda and correspondence] regarding the reassignment of the Applicant.

2. Under article 9, paragraph 1 of the Tribunal's Statute:

(a) To order the Respondent to reinstate the Applicant to his post as Chief of the Energy Branch, and to rescind the Respondent's decision to reassign the Applicant...

(b) To fix an appropriate award of compensation at the sum of three years' net base pay for the injury sustained by the Applicant...

(c) To fix an appropriate award of compensation at the sum of two years' net base pay for the injury sustained by the Applicant as a result of the failure to accord him the benefits of due process in his unjustified suspension for an unreasonable period of sixteen months. ...

(d) To fix an appropriate award of compensation at the sum of two years' net base pay as well as such other relief as the Tribunal may deem appropriate, ... for the injury sustained by the Applicant as a result of the failure ... to reinstate him to his post as Chief of the Energy Branch and the negative impact ... on the Applicant's professional status and ... his career prospects.

(e) To fix an appropriate award of compensation at the sum of two years' net base pay ... for the mental suffering inflicted upon him and his family and for the unjustified delays...

(f) To fix general damages for being deprived of the opportunity of being considered for promotion to D-2...

(g) To award the Applicant the sum of seven thousand five hundred US dollars ($7,500) in legal fees and related expenses...

(h) To order the Respondent to remove all negative and prejudicial material relating to the Applicant's suspension from service from his official status file.

(i) To order and direct the Respondent to issue a formal apology in writing to the Applicant for the unfair treatment afforded him...".

Whereas the Respondent filed his answer on 30 September 1992;

Whereas the Applicant filed written observations on 2 November 1992;

Whereas, on 22 October 1993, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Board of Auditors (hereinafter referred to as "the External Auditors") who, under financial regulation 12.11, reports to the General Assembly, conducted, between 2 October and 20 November 1989, an interim audit of the operations of the Department of Technical Co-operation and Development (DTCD). In auditing the practices followed by DTCD with respect to experts and consultants, the External Auditors noted, inter alia, that "one

consultant was hired five times on a staggered period from October 1987 to July 1988... Verification of the technical report of this consultant disclosed that two of the outputs did not meet the terms of reference."

While the External Auditors were conducting their review, the Applicant submitted for clearance a further Special Service Agreement (SSA), for the same consultant (Mr. Ronald A. King) and then, cancelled the new SSA on the grounds that "the consultant is no longer available to undertake proposed assignment."

The Internal Audit Division (IAD), which conducted its own investigation, in its report dated 27 November 1989, noted "questionable actions" taken by the Applicant, e.g. that fifteen cheques totalling US$ 77,000, issued in favour of the consultant, were personally picked up by the Applicant, from the Cashier's office and nine were actually cashed by him after initial endorsements by the consultant.

On 28 November 1989, the Acting Under-Secretary-General, Department of Administration and Management, referred the matter to the Assistant Secretary-General, Office of Human Resources Management (OHRM), who suspended the Applicant with pay. The Applicant was informed of this decision on 5 December 1989. The Applicant was given a copy of the audit report and asked to provide his comments thereon. The Applicant did so on 8 December 1989.

While the investigation was taking place, IAD continued its audit of DTCD operations and discovered irregularities in the consultancy of Mr. Pawan K. Gupta, including evidence consistent with the Applicant's cashing one of the cheques payable to Mr. Gupta. This was reported to the Acting Under-Secretary-General for Administration and Management on 4 May 1990. As a result, an additional investigation was undertaken.

After the investigations had been completed, the Administration decided not to take disciplinary action against the Applicant "in view of the fact that no evidence could be found that he had financially benefitted from the transactions ... and in view

of the general lack of proper controls in DTCD over the recruitment of consultants and the evaluation of their outputs."

In a letter dated 5 February 1991, the Director, Staff Administration and Training Division, OHRM, informed the Applicant as follows:

> "...you demonstrated extremely poor judgement in initiating Special Service Agreements for consultants whose credentials have not been properly checked. You both originated and cleared two of those agreements, in disregard of proper controls. Your actions in personally picking up and endorsing many of the cheques issued to the consultants were highly irregular. There was no convincing evidence that Mr. King's work products were delivered at the end of the contract period. Serious doubts also remain as to the value to the Organization of the work products generated by the consultants, raising doubts about the propriety of your certifying satisfactory performance under the contracts and authorizing payments. However, no evidence could be found that you financially benefitted from the transactions referred to above, and consequently no disciplinary measures within the meaning of Chapter X of the Staff Rules are envisaged.
>
> As a result, the Secretary-General has decided to lift the suspension pending investigation, effective immediately. However, this decision is without prejudice to whatever administrative action the Department of Technical Co-operation for Development would take with regard to your future assignment within the Department.
>
> Pending the determination of your assignment, you will be placed on special leave with pay until 15 March 1991."

On 2 August 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 15 August 1991, the Applicant lodged a second appeal with the JAB. Later, on 30 August 1991, the Applicant notified the JAB that he intended to combine the two appeals.

The Board adopted its report on 27 March 1992. Its findings and recommendations read as follows:

"115. The Panel unanimously

(a) Finds that the Appellant was among other staff members who had been involved in the irregularities investigated in DTCD, but was the only one suspended;

(b) Finds, however, that the Appellant was not unfairly singled out during the above-mentioned investigations;

(c) Finds that the Secretary-General acted properly when he initially suspended the Appellant from duty pending investigation but that he should have lifted that suspension upon verification of affidavits from the two consultants;

(d) Finds that while there was no evidence of misconduct on the part of the Appellant, he demonstrated poor judgement, especially in endorsing some of the cheques for consultants;

(e) Finds that the Secretary-General acted within his discretionary power when he decided to transfer the Appellant to a more suitable post, but that the decision to assign him to Geneva was bad administrative practice and anyway proved to be unnecessary;

(f) Finds that, in view of the fact that the decision to suspend the Appellant after the receipt of Mr. King's affidavit, which was not challenged, was maintained, the Appellant should have been given the possibility of defending himself before a joint disciplinary committee, and that by not doing so, the Administration denied him the due process of law;

(g) Finds that the suspension from duty was much too long, especially as no disciplinary action was initiated against the Appellant;

(h) Finds that the Administration did not control properly the activities in DTCD, especially the practice pertaining to consultancies and bears therefore part of the responsibility for the repeated irregularities in that department.

116. The Panel therefore unanimously recommends

(a) That the decision to transfer the Appellant to Geneva be rescinded;

(b) That the Appellant be fairly considered for posts for which he is suitable during the current restructuring of his department;

(c) That the Appellant be awarded a token $1.00 in recognition of the responsibility incurred by the Administration in the mismanagement of consultancies by DTCD and its consequent impact on the Appellant's administrative ordeal."

On 11 May 1992, the Assistant Secretary-General for Human Resources Management informed the Applicant that the Secretary General had decided as follows:

"With respect to your appeal against your suspension from duty, the Secretary-General fully shares the Board's views that you were not unfairly singled out during the various reviews of DTCD consultancies, and that the decisions (i) to investigate the irregularities which had been identified, and (ii) to suspend you from duty were justified. He concurs with the Board's observation that you had demonstrated poor judgement in the handling of the Special Service Agreements for the consultants recruited at your request, especially in picking up and endorsing some of the cheques issued to them.

However, bearing in mind that:

(a) the decision whether to refer a case to a joint disciplinary committee is within the discretion of the Secretary-General, and depends on the facts of the case as well as on the completeness or incompleteness of the evidence;

(b) the complexities of the case as well as the number of allegations made against you required a great deal of additional investigation after the receipt of statements submitted by the consultants in December 1989 and June 1990, including the need to verify the accuracy of those statements;

(c) the nature of the allegations precluded your being returned to duty before the investigation was concluded,

the Secretary-General has concluded that the contested decision to maintain you on suspension with full pay for the duration of the investigation, without referring the matter to a joint disciplinary committee, was fully justified and did not violate your due process rights. He notes that you remained on full pay status for the entire duration of the suspension.

The Secretary-General cannot accept the Board's recommendation that you should be awarded 'a token $1.00 in recognition of the responsibility incurred by the Administration' in DTCD's shortcomings in the management of its consultancies. While he regrets those shortcomings, they do not in any way excuse your own conduct. They were, nevertheless, fully taken into consideration in the decision to conclude the matter without referring it to a joint disciplinary committee.

With respect to your re-assignment to a more suitable post after your suspension from duty had been lifted, the Secretary-General takes note of the Board's finding that, in taking that decision, he had acted within his discretionary powers. He regrets that, at the time, no post other than that which was offered to you was available for your re-assignment. He notes, however, that the situation is now different, and has decided, in accordance with the Board's recommendation, that you be fairly considered for posts for which you are suitable during the current restructuring of your Department."

On 25 June 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The length of the investigation into his case was inordinate. The Applicant's suspension with pay became a form of disciplinary action which required proceedings before the Joint Disciplinary Committee and failure to institute them was a violation of his due process rights.

2. The suspension was inappropriate since there was no probable cause to investigate him.

Whereas the Respondent's principal contention is:

The decision to investigate the Applicant's activities did not prejudice any rights of the Applicant. Suspension with pay was appropriate during such investigation and did not constitute disciplinary action requiring a hearing before the Joint Disciplinary Committee.

The Tribunal, having deliberated from 19 October to 3 November 1993, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General dated 11 May 1992, which accepted, for the most part, recommendations of the JAB adverse to the Applicant's claims, and which rejected some recommendations favorable to him. The claims arose out of a lengthy suspension with pay of the Applicant, under staff rule 110.2. The suspension extended from 5 December 1989 to 5 February 1991, during an investigation by the Administration into alleged irregularities and suspected misconduct on the part of the Applicant. The Applicant contends that the suspension was wrongful and that he was injured thereby. He claims that he should be reinstated in his post, awarded compensation, damages, costs, and that all negative and "prejudicial" material relating to his suspension should be removed from his official file. He also asks that the Respondent be directed to issue a formal apology to him. As a preliminary measure, he asks that the Respondent produce certain documents regarding his proposed reassignment to Geneva which was subsequently cancelled. The Tribunal considers that the reassignment issue is moot and therefore sees no need for the documents requested. Likewise, the Tribunal sees no need to hold oral proceedings in this case.

II. The Applicant's suspension arose out of an interim audit of the former Department of Technical Cooperation for Development (DTCD). This audit, initially, raised questions about certain Special Service Agreements (SSA) between DTCD and a consultant, and the Applicant's conduct in connection with those agreements. During the course of the audit investigation, the Internal Audit Division (IAD), in a report dated 27 November 1989, noted what it considered to be irregularities. Among these was that the Applicant had picked up fifteen cheques issued to the consultant, at the U.N. cashier's office, six, each in the amount of US$3,850 and three, each in the amount of US$7,700. These nine cheques had been signed by the Applicant, as well as by the consultant, and cashed at the Chemical Bank in the U.N. Headquarters building. The nine cheques were issued at intervals from 3 May 1988 to 7 August 1989. They appear to be in payment for all or a portion of work done under four of the five SSA's awarded to the consultant between 9 October 1987 and 26 May 1989. The other six cheques covering the remainder of the five SSA's were not signed by the Applicant. The explanation for the Applicant's endorsement signature on the reverse side of the cheques was that he was merely identifying the consultant to the bank so that it would cash the cheques. But that, without more, is not what an endorsement signature means. A signature on the back of a cheque ordinarily indicates that the signer is liable on the cheque as an endorser and guarantor of prior endorsements - often because the signer has received or shared in the payment.

III. Because of the possibility that the Applicant's role in the cashing of these cheques signified misconduct on his part, he was suspended with pay. A detailed investigation, including various matters relating to the consultants employed by the Applicant, ensued. The work performed by the consultant referred to above was scrutinized carefully. Its usefulness and quality were examined. While this investigation was going on, the IAD audit discovered apparent irregularities in connection with consulting work performed by another individual, including evidence indicating that the

Applicant might have cashed one of the cheques payable to this consultant. This was reported to the Acting Under-Secretary-General for Administration and Management on 4 May 1990, and a further investigation relating to this consultant was initiated. It appears from this investigation, inter alia, that the Applicant and the consultant stated that the former endorsed one cheque from the Organization, payable in the amount of US$6,000 at the U.N. Chemical Bank branch in February 1987, in order to satisfy the bank as to the consultant's identity so that he could cash the cheque. The Tribunal notes, in this regard, that this consultant's SSA indicated that he had a Chase Manhattan Bank account at a branch located at 422 Lexington Avenue in New York City, not far from the U.N. Headquarters building. On 29 November 1990, the investigation was concluded. The Applicant's suspension was ended on 5 February 1991.

IV. Under staff rule 110.2, the Secretary-General is entitled to exercise reasonable discretion in suspending a staff member with pay during an investigation into suspected misconduct. In the absence of improper motivation, arbitrariness, mistake of fact, denial of due process, or other extraneous factors, the Tribunal will not interfere with investigatory action by the Secretary-General. In this case, it is clear to the Tribunal that ample justification existed for the investigations that took place. For example, the Tribunal considers that the Administration had valid reason for concern, to say the least, when it found that a consultant (whose business address was in New York City) was receiving cheques from the Organization and, with the assistance of the Applicant, obtained substantial amounts of cash for them, which he carried with him instead of depositing the cheques in his own bank and obtaining there, such cash amounts as he desired.

V. The Tribunal considers that any staff member placing his or her signature as an endorsement on a cheque payable to a consultant whom the staff member has hired and with whom he had been working closely should reasonably recognize, as a matter of common sense,

that such conduct may create grave suspicions about the bona fides of the staff member. Hence, a staff member who wishes to avoid becoming embroiled in investigations such as those which took place in this case, should scrupulously refrain from any involvement in assisting in the cashing of cheques payable to consultants by the Organization. It is entirely proper for the Organization to be alert to the possibility or the appearance of kickbacks or other corrupt practices as between staff members and consultants, and to investigate fully whenever it appears that such misconduct may have occurred. That is what was done here.

VI. There is no evidence that the action taken by the Secretary-General in suspending the Applicant was improperly motivated, arbitrary or based on any extraneous motives. Nor was the Applicant denied or deprived of due process in any respect in the course of the investigations.

VII. The Applicant argues that his suspension was unreasonably prolonged. He points to a change in staff rule 110.2(a), effective from 1 January 1990, which provides that during an investigation and pending the completion of disciplinary proceedings, a suspension should not "normally" be for more than three months. In this regard, the JAB believed that the suspension should have been lifted on the basis of the affidavits from the two consultants. The Tribunal disagrees. Although staff rule 110.2(a) speaks in terms of suspensions "normally" not exceeding three months, it is plain that a suspension may be for a longer period if the nature of the investigation so requires.

VIII. Here, it took 14 months before the suspension was lifted. In the Tribunal's view, the Secretary-General acted reasonably in continuing the suspension until all of the information deemed relevant was gathered and evaluated. Given the seriousness of the issues involved and the nature of the material that had to be considered, as well as the continuation of the inquiries regarding

various items, this investigation and suspension was not unduly prolonged.

IX. The Applicant and the JAB are mistaken in believing that merely because both consultants involved in the investigation submitted exculpatory affidavits, the Respondent was compelled to end the suspension. Their affidavits were not those of disinterested bystanders. In addition, the affidavits contained no explanation of (1) why cheques were cashed instead of being deposited in the consultant's bank accounts, (2) how cheques not signed by the Applicant were processed for payment, or (3) differences, if any, in the way cheques payable to the consultants were processed for payment, i.e., deposited or cashed. Nor was there any evidence by the consultants showing what became of the large cash amounts they say were received by them. The Respondent was, therefore, not obliged to give conclusive weight to such affidavits. Contrary to the view of the JAB, the Respondent was also not required to institute disciplinary proceedings before a Joint Disciplinary Committee if he did not wish to conclude his investigation on the basis of such affidavits. It was for the Respondent, upon the conclusion of the investigation, to decide whether disciplinary proceedings should be initiated. Under staff rule 110.3(b)(iii), a suspension with full pay is not a disciplinary measure. Unless and until the Respondent decided that disciplinary proceedings would be warranted, he was not required to submit the matter to a Joint Disciplinary Committee.

X. The Tribunal finds no merit in the Applicant's contentions regarding his suspension or its duration. The Tribunal finds that the evidence fully justified the conclusion of both the JAB and the Respondent as to the Applicant's poor judgement in his handling of SSA's for consultants recruited at his request, especially in endorsing some of the cheques issued to them. In this regard, the Tribunal notes that the Applicant was on full pay throughout the entire period, and thus suffered no monetary loss. Indeed, it is

the Organization that sustained a loss by paying the Applicant's salary while he rendered no service. To avoid these unfortunate consequences, the Administration should conduct its investigations as expeditiously as possible.

XI. The Applicant's contentions as to the failure to reinstate him in his former post, the alleged negative impact of the investigation on his reputation, his alleged mental suffering, the allegedly unjustified delays, and his being deprived of the opportunity to be considered for promotion to the D-2 level because of his suspension are likewise without merit. The non-reinstatement of the Applicant in his former post was evidently related to a reorganization. The Tribunal has no basis for finding that this entailed any unlawful conduct on the part of the Administration. The Respondent's decision of 11 May 1992, stated that the Applicant would be fairly considered for posts for which he is suitable "during the current restructuring of his department." Nothing to the contrary is before the Tribunal. This point was obviously not considered by the JAB. If there has been any negative impact on the Applicant's reputation or if he, or his family, underwent any mental suffering, that is not the fault of the Organization. Rather, it stems from the Applicant's poor judgement in engaging in activities which he should have recognized could easily raise suspicions of serious misconduct. The Applicant has no basis for claiming the loss of any possible opportunities of promotion to the D-2 level because he was on suspension. A staff member whose conduct was the subject of a wholly justified investigation like the one conducted in this case, bears the risk of such consequences.

XII. The Tribunal sees no justification for the Applicant's request that the Respondent issue an apology. Nor does the Tribunal consider that there is any valid basis for the Applicant's request that the records relating to this matter in the Applicant's official status file should be removed.

XIII. For the reasons set forth above, the application is rejected, as is the request for costs.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 3 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary

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3 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 616

Case No. 683: SIRAKYAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 4 August 1992, Sirak S. Sirakyan, a staff member of the United Nations, filed an application requesting the Tribunal:

> "... to rescind the decision [to demote the Applicant by one grade] of the Secretary-General and to decide, in line with the recommendation made by the Joint Disciplinary Committee (...), that the disciplinary measure be limited to a written censure by the Secretary-General, as contemplated in rule 110.3(a)(i) of the Staff Rules."

Whereas the Respondent filed his answer on 29 October 1992;

Whereas the Applicant filed written observations on 29 March 1993;

Whereas, on 15 June 1993, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Office at Vienna (UNOV) as a Security Officer, at the M-4 level (Manual Worker category), on 1 September 1979. He served on a series of short-term appointments until 1 February 1980, when his appointment was converted to a fixed-term appointment, due to expire

on 31 July 1980. He served thereafter on a series of fixed-term contracts and was converted from the Manual Worker category to the General Service category with effect from 1 January 1982. He was promoted to the G-4 level, with effect from 1 February 1983 and received a probationary appointment on 1 January 1984 and a permanent appointment, on 1 October 1984.

On 10 September 1990, the Chief, Personnel Service, wrote to the Applicant stating that the Austrian Ministry of Foreign Affairs had reported to UNOV, that the Applicant had engaged in the resale of goods purchased from the Commissary. He also notified the Applicant that this might constitute misconduct, under staff rule 110.1, leading to the institution of disciplinary proceedings. The Applicant was called for an interview on 19 September 1990 and informed that if he so wished, he could be assisted by counsel.

According to the record of the interview, the Applicant "admitted to having sold goods to [name withheld] and had signed a statement to this effect when he had been questioned in October 1989 by the Austrian Customs Office."

On 22 February 1991, the Personnel Officer informed the Applicant that his Commissary privileges were to be withdrawn for one year but that the Director-General reserved the right to apply other disciplinary measures in accordance with chapter X of the Staff Rules.

On 25 February 1991, the Personnel Officer informed the Applicant that the Director General had decided to institute disciplinary proceedings. He was also informed that if he agreed to waive referral to a Joint Disciplinary Committee (JDC), under staff rule 110.4(b), the Administration would seek the Assistant Secretary-General for Office of Human Resources Management's (OHRM) concurrence to limit disciplinary action to a written censure, under staff rule 110.3(e)(i). The Applicant waived his right to have the matter referred to a JDC.

However, on 6 May 1991, the Applicant was informed that the Assistant Secretary-General, OHRM, "had not agreed to the proposals put forward by UNOV Personnel Service ... in view of the seriousness

of [his] offence, and particularly the involvement of the Host Government". The Secretary-General would be prepared to forego referral to a JDC only if the Applicant were "willing to accept a demotion of one grade."

On 8 July 1991, the Applicant, after an exchange of memoranda with the UNOV Personnel Service, informed the Personnel Officer that he would not agree to a demotion of one grade, and asked that his case be referred to a JDC.

The JDC adopted its report on 30 January 1992. Its findings, conclusion and recommendation read as follows:

"FINDINGS

9. The staff member freely admits having violated Commissary Rules in so far as he gave (sold) Commissary goods at no profit to his former colleague. The panel, however, did not obtain conclusive proof concerning the seriousness and gravity of the violations, i.e., neither profit nor the alleged amount of 50,000 Austrian schillings, nor that the staff member knew that his former colleague was engaged in resale of the goods.

10. The contents of the protocol signed by the staff member at the Customs Office are not known to the panel, since no copy of it was provided. The panel therefore knows about it only indirectly, as summarized in other documents. With respect to the allegation of duress made by the staff member, there is at least partial confirmation of pressure being exerted upon him by the authorities to persuade him to sign, as the lawyer who spent some time at the Customs Office with the staff member indicated to the Chairman of the panel, during the above-mentioned telephone conversation, that he had overheard an official telling the staff member that it would be better for him to agree to sign the statement. The lawyer, however, did not hear any clear threat of investigative arrest, although this may have occurred at a time when he was not present. The panel, therefore, is of the opinion that the veiled or indirect threats may have intimidated the staff member to sign a statement which did not fully correspond to the facts, particularly in view of his condition as a naturalized citizen of the Host Country. The panel asked the staff member why he did

not provide the Administration with the correct information of events at the time when he was asked by them to make a statement. He stated that he feared a withdrawal of his previous admission could have led to the re-opening of proceedings against him by the Austrian authorities, and that this fear was fed by the uncertainty created by the lack of further action on the part of those authorities since the original interview at the Customs Office almost a year earlier.

11. The lack of action on the part of the authorities since the original investigation, over two years by now, or even since the last note verbale from the Foreign Ministry to the United Nations Office at Vienna, dated 13 March 1991, could be interpreted as indicating that the case has been dropped. This could be due to a variety of reasons, including lack of sufficient evidence or an evaluation of the case as not deserving any further effort. Yet another factor taken into account by the Panel in reaching its conclusion is the fact that the staff member's violations have already led to his one-year suspension of Commissary privileges.

CONCLUSION AND RECOMMENDATION

12. In view of the absence of conclusive evidence concerning the alleged gravity and seriousness of the violations, the panel recommends that the disciplinary measure be limited to a written censure by the Secretary-General, as contemplated in rule 110.3(a)(i) of the Staff Rules."

On 5 May 1992, the Assistant Secretary-General, OHRM, transmitted to the Applicant a copy of the JDC report and informed the Applicant as follows:

"The Secretary-General has re-examined your case in the light of the Committee's report. He cannot accept the Committee's recommendation because he finds the penalty recommended insufficient for the magnitude of the abuse. ...

..."

He added:

> the Secretary-General has decided to impose upon you the disciplinary measure of demotion by one grade."

On 4 August 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's contention is:

The penalty imposed by the Respondent for the Applicant's acknowledged violation of the rules is unduly harsh, particularly in view of the recommendation by the JDC.

Whereas the Respondent's principal contention is:

The Secretary-General's decision to demote the Applicant and to refuse to accept the JDC's recommendation of a written censure was a valid exercise of his discretion to impose disciplinary measures.

The Tribunal, having deliberated from 1 November to 3 November 1993, now pronounces the following judgement:

I. The Applicant contests a decision by the Respondent, dated 5 May 1992, demoting the Applicant by one grade. A Joint Disciplinary Committee had previously recommended to the Respondent that the appropriate disciplinary measure consist of a written reprimand, under staff rule 110.3(a)(i). However, the Respondent found the recommended penalty insufficient for the magnitude of the offence because, as the Assistant Secretary-General informed the Applicant on 5 May 1992:

> "(a) there was an admitted serious violation of the Commissary rules as well as UN standards of integrity;
>
> (b) the act was repeated and premeditated, not a sudden yielding to temptation;

(c) the violation was of such a nature as to bring the Organization into disrepute in the host country;

(d) abuse of a privilege conferred on the Organization by a government may lead to the withdrawal of the privilege, to the detriment of other innocent staff members; and

(e) [of] ... the absence of new facts or mitigating circumstances unearthed by the [Joint Disciplinary] Committee."

II. The Tribunal has held repeatedly that the Respondent has broad discretion with respect to the imposition of disciplinary measures in cases involving misconduct by a staff member and that the Tribunal's review of the exercise of such discretion is limited to determining whether it is vitiated by a lack of due process, procedural irregularity, extraneous factors such as bias, mistake of fact or law or arbitrariness. Moreover, the Tribunal has also held consistently that the recommendation of a joint disciplinary committee, being advisory only, is not binding upon the Respondent and need not be accepted by him, when he has a valid basis for rejecting it. (Cf. Judgements No. 424, Ying (1988); No. 425, Bruzual (1988); No. 429, Beyele (1988); No. 479, Caine (1990) and No. 582, Neuman (1992).

III. With these principles in mind, it is clear that the application must fail. For, there is no evidence of any lack of due process, procedural irregularity, mistake of fact or law, or that any extraneous factor was involved in the Respondent's decision. The Applicant admitted during investigations by Austrian Government authorities and by the Respondent that he violated the Commissary rules by acquiring tax exempt items from the Commissary, not for his personal use, but for resale to another person. The Applicant argues that, in the circumstances of his case, the penalty should have been limited to a written censure, as recommended by the Joint Disciplinary Committee. But, as noted above, the Tribunal will not entertain arguments such as those presented by the Applicant which

relate mainly to the inferences that he contends should have been drawn by the Respondent from facts, and to appeals for leniency on various grounds. Nor will the Tribunal attempt to substitute its judgement for that of the Respondent regarding the penalty that is appropriate for the misconduct involved. It is clear from the facts that a reasonable basis existed for the Respondent's decision and that the penalty imposed was not disproportionate. The Tribunal, therefore, need not inquire further.

IV. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 3 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 617

Case No. 667: DE BRANDT-DIOSO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Hubert Thierry;

Whereas at the request of Irma de Brandt-Dioso, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 15 January and 15 April 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 April 1992, the Applicant filed an application inter alia, requesting the Tribunal:

"(a) To find and rule that the New York General Service Classification Appeals and Review Committee (NYGSCARC), as presently established (ST/AI/301) (...), violates the Staff Regulations and Rules, particularly those set out in Chapter XI (...) pertaining to joint appeals board;

...

(c) To find that the basic premise of the classification exercise was violated, namely that the Classification Section pre-determined the Applicant's post to belong to the General Service category, and rule that the Applicant's post be reviewed against established professional standards as well;

(d) To find that the Administration's failure to audit the Applicant's post discriminated against her and thus deprived her of an important part of the classification exercise, ...

(e) To find that, by withholding the findings and recommendations of both the Classification Section and the NYGSCARC the Applicant was denied the opportunity to prepare her appeal in light of those findings and recommendations, ...

(f) To order the Secretary-General to implement the Tribunal's recommendation in the Ibarria case (...) and further rule that the Applicant be provided with all findings, reasonings and rationales related to the classification of her post so as to allow her to present an appeal at a later date;

(g) To find that the Applicant was denied the opportunity to submit her appeal directly to the New York General Service Classification Appeals and Review Committee, as provided for in Joint Appeals Board procedures (...);

...

(i) To find and rule that the Applicant has a right under staff regulation 2.1 to have her functions correctly classified, as emphasized by Tribunal Judgement 388 (Moser) (...), and in addition to correct or clarify staff regulation 2.1 (...) when it says '... shall make appropriate provision for the classification of posts and staff...;

..."

Whereas the Respondent filed his answer on 14 May 1992;

Whereas, on 17 March 1993, the President of the Tribunal requested the Respondent to provide the Applicant "with the analysis by the Compensation and Classification Service referred to in her case as one of the elements considered by NYGSCARC in making its recommendations on the level of the post";

Whereas, on the same date, the Tribunal also asked the Applicant "to advise the Tribunal whether there is any further information that she wishes to be considered, which deals

exclusively with the above analysis and the nature of the duties and responsibilities of the post, as set forth in the job descriptions to which that analysis was directed";

Whereas, on 23 March 1993, the Respondent submitted to the Tribunal the documentation requested and the Applicant, on 30 April 1993, provided her comments thereon, together with replies to the questions put by the Tribunal;

Whereas the Applicant filed written observations on 28 April 1993;

Whereas, on 3 June 1993, the Respondent submitted an additional document;

Whereas, on 15 July 1993, the Applicant submitted additional observations;

Whereas the facts in the case are as follows:

Irma de Brandt-Dioso entered the service of the United Nations on 16 June 1975, on a three month fixed-term appointment at the G-3, step I level, as a Bilingual Clerk in the Training and Examinations Service of the Office of Personnel Services (OPS). Her appointment was extended for further fixed-term periods and on 1 January 1976, she was granted a probationary appointment. On 1 June 1977, she received a permanent appointment and was promoted to the G-4 level, as a Senior Clerk-Typist. On 1 January 1982, the Applicant was promoted to the G-5 level, as an Administrative Assistant and, with effect from 1 October 1984, she was re-assigned within OPS, to the Staff Activities and Housing Unit. The Applicant was promoted to the G-7 level, with effect from 1 October 1985, as Personnel Assistant. The Applicant was temporarily reassigned to the United Nations Transition Assistance Group (UNTAG) in Namibia, from 23 June 1989 through 22 December 1989, and to the United Nations Angola Verification Mission (UNAVEM) in Lusaka, with effect from 1 May 1992 through 5 April 1993. From 1 May through 4 November 1992, the Applicant was paid a special post allowance to the P-2 level, as Electoral Team Leader with UNAVEM II.

In July 1982, the International Civil Service Commission had approved the establishment of a seven-level grading structure (to replace the old five-level structure) for the General Service category in New York and promulgated job classification standards for the seven levels. As a result, all General Service posts in New York were classified under procedures set out in administrative instruction ST/AI/301 of 10 March 1983.

On 28 April 1986, the Assistant Secretary-General, OPS, informed the staff, in information circular ST/IC/86/27, "of the action taken with respect to the classification exercise for posts in the General Service ... categories at United Nations Headquarters and to outline future action, in particular with respect to the implementation of the results of the exercise and the related appeals procedure." NYGSCARC was established with effect from 16 May 1986, to hear appeals against the results of the classification exercise.

A description of the post encumbered by the Applicant was prepared for initial classification and submitted to the Classification Service on 3 September 1986. The job description was reviewed by the Classification Review Panel and classified at the G-6 level.

On 21 January 1987, the Assistant Secretary-General, OPS, informed the Applicant that he had approved this recommendation.

In a memorandum dated 26 May 1987, to the Assistant Secretary-General, Office of Human Resources Management (OHRM[1]), the Applicant appealed the classification decision arguing that her functions were "largely professional in nature".

NYGSCARC reviewed the appeal at its 15th meeting on 17 May 1989 and recommended that the post be upgraded to the GS-7 level.

In a memorandum dated 11 September 1989, the Assistant Secretary-General, OHRM, informed the Applicant that he had approved the recommendation by NYGSCARC. The Applicant was retroactively promoted to the G-7 level, with effect from 1 October 1985.

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[1] Successor of OPS.

On 10 July 1990, the Applicant wrote to the Assistant Secretary-General, OHRM, requesting to meet with him, "to explain the special nature of my functions and professional duties which would call for my post to be classified at a higher level."

Having received no reply, on 24 September 1990, the Applicant wrote to the Assistant Secretary-General, OHRM, who, in a written communication dated 24 April 1991, stated:

> "6. As far as an application to the Joint Appeals Board is concerned, as you may be aware, in accordance with staff rule 111.2, a staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing. In view of the specified time-limit, your application for review of the case by JAB is clearly time-barred, considering that you were informed about the outcome of the appeal in January 1990, as per your memorandum of 10 July to [the Assistant Secretary-General, OHRM). The same is true with respect to an application to the Administrative Tribunal. In accordance with information circular ST/IC/86/27 of 3 February 1982 on Internal Resource Procedures in the United Nations Secretariat, an appeal to the Administrative Tribunal can generally be taken only after prior consideration of the matter by a joint appeals board. The application to the Administrative Tribunal must be submitted to its Executive Secretary within 90 days of the communication to the staff member of a negative decision of the Secretary-General following a JAB consideration.
>
> 7. I regret that we cannot be more helpful but, as you could see from the above, all procedures applicable in respect to your case have been scrupulously followed and all means of recourse have been exhausted. Therefore, please be advised that the classification decision allocating the post you encumber to the GS-7 level is to be considered as final."

On 24 June 1991, the Applicant sought the Secretary-General's agreement to submit an appeal from the decision to classify her post

at the G-7 level, directly to the Tribunal, under article 7.1 of the Tribunal's Statute. On 10 July 1991, the Assistant Secretary-General, OHRM, informed the Executive Secretary of the Tribunal that:

> "Under the circumstances of this case, the Secretary-General is of the opinion that submission of the dispute to the New York General Service Classification and Review Committee satisfies the requirement that a dispute be submitted to 'the joint appeals body' set out in article 7, paragraph 1, of the Administrative Tribunal Statute.
>
> Alternatively, the Secretary-General would agree to the direct submission of [the Applicant's] application to the Administrative Tribunal."

On 16 July 1991, the Director, Staff Administration and Training Division, OHRM, informed the Applicant that the Secretary-General consented to the Applicant's request, stating: "the Secretary-General considers that your case satisfies the requirements of article 7 of the Tribunal's Statute."

On 15 April 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The existence and the procedures of NYGSCARC violate the Staff Regulations and Rules and the Applicant's due process rights.

2. The Respondent pre-determined the classification level of the Applicant's post.

3. The Respondent wrongfully failed to conduct a job classification "audit" of the Applicant's post, as required by paragraph 13 of administrative instruction ST/AI/301.

4. The Respondent prevented the Applicant from submitting her appeal directly to NYGSCARC.

5. The Applicant had a right to have her post and her functions correctly classified.

Whereas the Respondent's principal contention is:

The Respondent's discretionary decision with regard to the classification of the level of the Applicant's post was properly taken, following an independent review by a specialized appeals body.

The Tribunal, having deliberated from 21 October to 3 November 1993, now pronounces the following judgement:

I. The Applicant challenges a decision dated 24 April 1991, with regard to action dated 11 September 1989, classifying the Applicant's post at the G-7 level. The decision rejected the Applicant's claim that her post should have been classified at the Professional level. The sequence of events leading to this was as follows: a request for classification of the Applicant's post was made in September 1986. The post was classified at the G-6 level in January 1987, upon the recommendation of the Classification Review Panel, under information circular ST/IC/86/45. The Applicant appealed this decision by a letter dated 26 May 1987. A reply, dated 11 September 1989, informed the Applicant that, upon the recommendation of the New York General Service Classification Appeals and Review Committee (NYGSCARC), her post was being re-classified at the G-7 level. She objected and requested consent for a direct appeal to the Tribunal. By a letter dated 16 July 1991, the Applicant was told that the Respondent considered that her case could properly be presented to the Tribunal under article 7 of the Tribunal's Statute. A letter dated 9 September 1991, from the Director, Staff Administration and Training Division, OHRM, advised the Applicant that the agreement for direct submission to the Tribunal pertained to the 24 April 1991 communication referred to above.

II. The Applicant's pleas ask the Tribunal to determine that (a) NYGSCARC procedures and functions are in violation of article IX of the Staff Regulations and Rules, (b) there was an unlawful predetermination, for budgetary reasons, that the Applicant's post

should be classified in the General Service category, and (c) that there should be an audit of her post before reclassification. She also asks that the Tribunal recommend that all posts on appeal to NYGSCARC be audited. In addition, the Applicant asks the Tribunal to determine that she was denied due process and the opportunity to submit her appeal directly to NYGSCARC, as provided in JAB procedures, and that she was denied rights under staff rule XI. Finally, the Applicant asks the Tribunal to determine her rights under staff regulation 2.1 and to "correct or clarify staff regulation 2.1" in a specified manner. Oral proceedings are also sought by the Applicant. However, the Tribunal concludes that the mate ial before it is adequate for a decision in this case and that there is no need for oral proceedings. That request is denied.

III. The issues in this case are similar to those presented to the Tribunal in Judgement No. 541, Ibarria (1991), and in other post classification cases decided by the Tribunal at its Geneva Session in 1993. In Ibarria, the Tribunal recalled its jurisprudence in Judgement No. 396, Waldegrave (1987), in paragraph XV of which the Tribunal held:

> "It is not the function of the Tribunal to substitute its judgement for that of the Secretary-General in job classification matters. This would be so even if the Tribunal had the required expertise in this area - which it does not. For the most part, the arguments advanced on behalf of the Applicant seek to have the Tribunal determine independently how it would classify the post in question, but this is not the role of the Tribunal. It is instead the function of the Tribunal to determine whether under all the circumstances, the Respondent has acted within his reasonable discretion..."

IV. The same principles govern this case. The Applicant's contentions are aimed largely at persuading the Tribunal that the content of the Applicant's post is such that it should be classified

at the Professional level. As indicated above, the Tribunal will not enter into an evaluation of the elements of the Applicant's job description.

V. As in Ibarria, the Tribunal's concern is with matters such as a denial of due process if the staff member neither sees nor has an opportunity to comment on documentation sent by the service in charge of classification to NYGSCARC. The Tribunal found that the procedure before NYGSCARC did not fully afford the Applicant the possibility of stating her case since documentation furnished to NYGSCARC by the Compensation and Classification Service was not made available to her. She therefore had no opportunity to comment on it. In Judgement No. 541, Ibarria (1991), the Tribunal stated that "... in proceedings before [NYGSCARC] ... both parties should see such recommendation considered by that body."

VI. In order to remedy this omission, the Tribunal, on 17 March 1993, ordered the Respondent to make the documentation in question available to the Applicant. This was done. Her comments, in the view of the Tribunal, present no significant new material which was not previously before NYGSCARC, in either the job description signed by the Applicant, the arguments previously advanced by her in connection with her classification appeal, or in the information submitted to NYGSCARC by the Compensation and Classification Service in its memorandum dated 26 April 1989. The Applicant's comments, dated 30 April 1993, and others submitted thereafter, essentially reiterate all of her previous arguments regarding the alleged professional nature of her job, though some are couched in a slightly different form. What she says, to a large degree, simply reflects judgemental differences between her and the Compensation and Classification Service or NYGSCARC, as to whether her post more closely matches General Service or Professional classification guidelines. But the Tribunal concludes that nothing has been submitted warranting further consideration by NYGSCARC. Although it

might have been desirable for NYGSCARC to have set forth the considerations which caused it to recommend that the post be classified at the G-7 level, the highest in the General Service category, rather than the G-6 level recommended by the Compensation and Classification Service, the Applicant was obviously not injured by her level being raised. Moreover, the Applicant's contentions are not aimed at differences between General Service levels, but at the difference between the General Service and the Professional classifications. NYGSCARC was aware of the Applicant's contentions and obviously did not agree with them. Thus, the procedural flaw mentioned above, which has been corrected, has not had any detrimental effect. The Tribunal holds that the Respondent acted within his reasonable discretion in adopting the recommendation of NYGSCARC.

VII. With respect to the Applicant's contention of unfairness, because there was a predetermination that the Applicant's post belonged to the General Service category, and that this stemmed from budgetary considerations, the Tribunal finds that there is no evidence whatever supporting this contention. The Compensation and Classification Service has specifically denied having made any predetermination. It appears from NYGSCARC's reclassifying as professional some posts that were previously classified in the General Service category, that it did not make predeterminations, much less based them on budgetary considerations. The evidence, in particular the upgrading of the Applicant's post, indicates that NYGSCARC has examined posts fairly and objectively. Hence, the Tribunal rejects this contention by the Applicant.

VIII. With respect to the Applicant's claim that the failure to audit her post discriminated against her, the Tribunal reiterates its determination in Ibarria that the Compensation and Classification Service has discretion as to whether to conduct an audit in any particular case. The Tribunal finds nothing in the

circumstances of this case that would impugn the exercise of that discretion. The Applicant's post was classified on the basis of the job description she signed, as amplified by her submission on appeal, as well as the analysis of the Compensation and Classification Service, which based its views on her job description. The fact that a previous job description of the post had been audited, or that handwritten notes relating to that audit are only partially legible, is immaterial. The conclusion of the Compensation and Classification Service that an audit was unnecessary in this case, was within its discretion.

IX. With respect to the various contentions by the Applicant related to the difference between appeal procedures under Chapter XI of the Staff Regulations governing JAB proceedings and NYSGCARC appeals procedures, under administrative instruction ST/AI/301, the Tribunal reiterates the view stated in Judgement No. 597, Colayco (1993), paragraph X. The present appeal, like Colayco, is before the Tribunal on the basis of the Applicant's request for consent to direct appeal and the letters dated 9 September 1991, and 16 July 1991, referred to in paragraph I of this Judgement. That correspondence expressed a belief by the Respondent that NYGSCARC stood in the same position as a joint appeals board insofar as the jurisdiction of the Tribunal is concerned. That precise question has not previously been decided and need not be decided in this case, in view of the consent to direct appeal.

There are, as has been pointed out by the Applicant, some meaningful differences between NYGSCARC and the Joint Appeals Board. In Ibarria, the Tribunal expressed concern at NYGSCARC's procedures, but found that with the modification discussed in paragraph VIII of that Judgement, they met minimal due process requirements. The Tribunal believes that, if the Respondent wishes to retain a specialized body such as NYGSCARC, which, in advising the Respondent, appears to rely heavily on the views of the Compensation and Classification Service, it would be appropriate for

that body to approximate - in what is essentially an adversarial proceeding - more closely the procedures of the JAB. This would ensure a comparable level of transparency and observance of due process. In the Tribunal's opinion, this ought to lead not only to better informed decisions but would avoid or lessen the delays and need for remand arising from procedural problems.

X. The Tribunal notes that in this case, the independent review and judgement of NYGSCARC led it to conclude, contrary to the Compensation and Classification Service recommendation, that the Applicant's post should be reclassified to the G-7 level, rather than to the G-6 level. The Tribunal also notes that the Applicant's claim of having been denied due process because she did not know the composition of the NYGSCARC Classification Panel lacks merit, as does her contention that she was denied the right to counsel. The membership of NYGSCARC was announced by information circular ST/IC/88/65 dated 21 December 1988. This was sufficient to apprise the staff of the persons who would be considering classification appeals. Moreover, there was no impediment to the Applicant obtaining counsel to advise or assist her in submitting her classification appeal.

XI. With respect to the Applicant's request for a ruling under staff regulation 2.1 that she has a right to have her functions correctly classified, staff regulation 2.1 speaks for itself in requiring the Respondent to make appropriate provision for the classification of posts and staff. This, the Respondent has done in cooperation with the International Civil Service Commission, acting under article 13 of its Statute. There is no occasion in this case for the Tribunal to pronounce on any abstract questions regarding staff regulation 2.1. Moreover, there is no issue properly before the Tribunal in this case which calls upon it to address any alleged inconsistency in the language of staff regulation 2.1.

XII. For the foregoing reasons the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Hubert THIERRY
Member

New York, 3 November 1993

R. María VICIEN-MILBURN
Executive Secretary